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No._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1986

DOUBLE RAINBOW GOURMET ICE CREAMS,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

and

PILLSBURY COMPANY, INC., et al.,
Real Parties in Interest.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the lower courts apply improper standards and inadequate procedural safeguards when they disqualified petitioner's counsel from participating in this federal antitrust action?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding below are Double Rainbow Gourmet Ice Creams, The Pillsbury Company, Inc. and The Haagen-Dazs Company, Inc.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

Petitioner, Double Rainbow Gourmet Ice Creams ("Double Rainbow"), respectfully prays this Court to issue a writ of certiorari to review the Opinion and Order re Disqualification of Counsel dated May 21, 1986 in the United States District Court for the Northern District of California, and the Order Denying Petition for Writ of Mandamus of the United States Court of Appeals for the Ninth Circuit dated September 24,

1986. This Court has effectively foreclosed appellate review of orders disqualifying counsel, a circumstance that invites abusive and tactically-motivated disqualification motions. Such a motion was made and granted in this federal antitrust case, because the lower courts refused to accord petitioner fundamental due process rights to an evidentiary hearing and applied erroneous substantive standards. In order that such abuses not occur in actions brought under federal law, this Court should grant certiorari to establish guidelines for lower courts considering motions to disqualify counsel.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was rendered on September 24, 1986, and is unreported. It is attached as exhibit A. The opinion of the United States District Court for the Northern District of California granting the motion to disqualify and giving rise to the petition for writ of mandamus before the Ninth Circuit is reported in *Haagen-Dazs Co. v. Perche No! Gelato, Inc.*, 639 F. Supp. 282 (N.D. Cal. 1986), and is attached as exhibit B.

JURISDICTION

The judgment of the Ninth Circuit denying petitioner's petition for a writ of mandamus was entered on September 24, 1986. Petitioner has timely filed this petition for a writ of certiorari, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

There are no pertinent statutes involved.

STATEMENT OF THE CASE

Double Rainbow is a California corporation engaged in the manufacture and sale of what is known as super premium ice cream. The Pillsbury Company ("Pillsbury"), a Delaware corporation with its principal place of business in Minneapolis, Minnesota, entered the super premium ice cream business by purchasing The Haagen-Dazs Company, Inc. ("Haagen-Dazs"), in 1983. Haagen-Dazs is a New Jersey corporation that manufactures and sells super premium ice cream. Haagen-Dazs and Double Rainbow are competitors. A central issue in this litigation is whether Haagen-Dazs' distribution policies violate federal antitrust laws, including Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

On August 30, 1985, Haagen-Dazs filed an action against Double Rainbow in the Northern District of California for a declaratory judgment that Haagen-Dazs' distribution policies do not violate the antitrust laws. On November 13, 1985, Double Rainbow sued Haagen-Dazs and Pillsbury in the District of Minnesota for antitrust violations. The Minnesota action was ordered transferred to the Northern District of California on February 14, 1985.[1] On December 13, 1985,

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[1] Currently, there are four cases pending in the San Francisco Bay Area involving the legality of Haagen-Dazs' distribution policies. The cases are *The Haagen-Dazs Company, Inc. v. Double Rainbow Gourmet Ice Cream, Inc.*, (N.D. Cal. No. C-85-6553 CAL); *The Haagen-Dazs Company, Inc. v. Perche No! Gelato Inc.*, (N.D. Cal. No. C-85-5819 CAL); *Two Count Company, Inc. v. The Haagen-Dazs Company, Inc.*, (Alameda County Superior Court No. H-107998-8); *Double Rainbow Gourmet Ice Creams, Inc. v. The Pillsbury Company*, (N.D. Cal. No. C-86-0583 CAL) (transferred from the Minnesota District Court on February 18, 1986). Another case, *Perche No! Gelato, Inc. v. The Haagen-Dazs Company, Inc.*, (D. N.J. No. 85-1061, Stern, J.), was ordered transferred to the Northern District of California by the Judicial Panel on Multidistrict Litigation under 28 U.S.C. § 1407. (Opinion and Order at p. 2 n. 1.)

Haagen-Dazs and Pillsbury moved in the Northern District of California to disqualify Double Rainbow's counsel in both cases.

On January 21, 1986, United States District Judge Charles A. Legge in the Northern District of California heard argument on the motion to disqualify. (A copy of the Reporter's transcript is included in the Appendix to the petition for writ of mandamus as Exhibit B.) Double Rainbow was represented at the time by both Minneapolis and San Francisco counsel. The law firm of Gray, Plant, Mooty, Mooty and Bennett ("Gray, Plant") was Double Rainbow's Minneapolis counsel, and the firm of Alioto & Alioto ("Alioto") was Double Rainbow's San Francisco counsel. The sole basis for the motion for disqualification was the past and present employment of Franklin C. Jesse, Esq. ("Jesse"), an attorney formerly employed as in-house counsel in Pillsbury's legal department, and currently associated with Gray, Plant as "International Counsel." *Haagen-Dazs Co. v. Perche No! Gelato, Inc.*, 639 F. Supp. 282, 284 (N.D. Cal. 1986).

In opposition to the motion to disqualify, Double Rainbow submitted the declaration of Mr. Jesse (a copy is included in the Appendix to the petition for writ of mandamus as Exhibit C), which set forth specifically and in detail the nature of the work he performed while at Pillsbury. Mr. Jesse's declaration further corrected, point by point, inaccuracies and unsupported assertions in declarations submitted by Haagen-Dazs and Pillsbury in support of their motion to disqualify. Double Rainbow also submitted the declaration of the Gray, Plant attorney handling this litigation, Daniel R. Shulman (a copy is included in the Appendix to the petition for writ of mandamus as Exhibit D), and a supplemental declaration of Mr. Jesse (a copy is included in the Appendix to the petition for writ of mandamus as Exhibit E).

In support of their motion, Pillsbury and Haagen-Dazs submitted affidavits of three individuals: Kevin Hurley, President and Chief Executive Officer of Haagen-Dazs; Ronald E. Lund, Vice President and Associate General Counsel of Pillsbury; and Richard J. Wegener, in-house counsel for Pillsbury (copies are included in the Appendix to the petition for writ of mandamus as Exhibits F, G and H respectively). By contrast to the evidence presented by Double Rainbow, the declarations submitted by Pillsbury and Haagen-Dazs were characterized by innuendo, speculation, unsubstantiated supposition, and inadequate foundation.

Generally, Double Rainbow disagreed with Pillsbury and Haagen-Dazs on virtually every major, as well as nearly each subsidiary, factual proposition underlying the motion to disqualify. Given the stark differences in the parties' factual accounts of the circumstances surrounding Mr. Jesse's employment at Pillsbury, Double Rainbow requested an evidentiary hearing on numerous occasions both before and during the disqualification hearing, so that the district court could observe the credibility and demeanor of witnesses and determine whether the evidence submitted had the proper foundation.[2] The court, however, rejected Double Rainbow's requests for an evidentiary hearing and refused to allow Double Rainbow to put Mr. Jesse on the stand or cross-examine Mr. Lund or Mr. Wegener. Instead, the court chose to decide the issue based on the conflicting declarations and the argument of counsel.

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[2] Messrs. Jesse, Lund and Wegener were all present at the hearing on the motion to disqualify. Double Rainbow requested an evidentiary hearing and the opportunity to present evidence or cross examine, or suggested that live testimony was necessary, on at least seven occasions: in its memorandum in opposition to the motion to disqualify at pp. 3 and 25; in its supplemental memorandum in opposition to the disqualification motion at p. 2; and five times at the hearing on January 21, 1986. (Reporter's transcript at pp. 26, 65, 73, 81, and 85.)

In response to Double Rainbow's request that Mr. Jesse be allowed to testify, the district court stated that it would assume the truth of what Double Rainbow's counsel was saying and the declarations supplied by Double Rainbow. (Reporter's transcript at p. 65.) At the end of the hearing, counsel for Double Rainbow made one last attempt to put Mr. Jesse on the stand. Counsel stated that if the court would accept the facts in Mr. Jesse's declaration as true, that was acceptable, but that Mr. Jesse was at the hearing to testify so the court could assess credibility to the extent that the court would be attempting to resolve conflicting presentations. (Reporter's transcript at p. 85.) In response, Judge Legge stated, "I don't think his testimony would be of assistance since he made the statement on the record in declarations and I can simply accept that."

Mr. Jesse's declarations established that he was employed at Pillsbury from 1974 to October of 1984. During that time, he held various positions in and out of the Law Department, including general attorney (1974-76); senior attorney (1976-79); international group counsel (1979-81); vice president and secretary (1980-82); and senior corporate counsel (1982-84).

On November 1, 1984, Mr. Jesse joined Gray, Plant as "International Counsel," the designation that appears for him on the Gray, Plant letterhead. After joining Gray, Plant, Mr. Jesse had the status of an associate. His compensation came from a salary and a percentage of fees received for services performed either by him or on files he generated. He could not be considered for shareholder status at Gray, Plant before the end of 1986; at that time, his selection was to be dependent upon his performance. His work involved primarily international law; he did not work on any matter with any of the

Gray, Plant attorneys handling this litigation. Nor had he communicated, orally or in writing, with anyone in the Alioto office. Significantly, Mr. Jesse never had any financial interest in this litigation, or in any other matter in which the Gray, Plant firm and the Alioto firm were associated. (Jesse Declaration ¶ 4(a)-(d).) Mr. Jesse's sole connection with this litigation was in responding to the ethical charges raised by Haagen-Dazs and Pillsbury. (Jesse Declaration ¶ 14(e)-(j).)

While at Pillsbury, Mr. Jesse worked on only three matters involving Haagen-Dazs: an Australian trademark registration; a sales arrangement in Singapore; and a joint venture in Japan. Of these three matters, only the Japanese joint venture involved a substantial time commitment. (See Order and Opinion at p. 4.) The Japanese joint venture "involved the negotiation and drafting of various agreements and other documents in order to establish a joint venture among Haagen-Dazs and two Japanese companies for the sale of Haagen-Dazs ice cream in Japan." (Jesse Declaration ¶ 5.)

The objective of the joint venture was to establish an arrangement permitting Haagen-Dazs to sell its product in Japan, consistent with Japanese business methods and practices. The objective was *not* to replicate in Japan the Haagen-Dazs domestic business, organization, and practices. Given the differences between doing business in Japan and the United States, such an objective would have been unattainable.

In order to negotiate the Japanese joint venture for Haagen-Dazs, therefore, it was *not* necessary for Mr. Jesse to become familiar with Haagen-Dazs' policies relating to its domestic operations. Nor did Mr. Jesse become familiar with Haagen-Dazs' policies relating to domestic operations. Mr. Jesse did not consult with Haagen-Dazs' personnel or learn about the nature of Haagen-Dazs' business in the United States, and,

in particular, its distribution policies. (Jesse Declaration ¶ 6-7.) Pillsbury and Haagen-Dazs submitted no declaration establishing that any Pillsbury or Haagen-Dazs employee had discussed with Mr. Jesse Haagen-Dazs' domestic operations, and, in particular, Haagen-Dazs' distribution policies.

Throughout the course of his employment with Pillsbury, Mr. Jesse received no confidential information with respect to Haagen-Dazs, other than information received in connection with the three international matters, which information did not include information with respect to Haagen-Dazs' domestic distribution practices and policies. (Jesse Declaration ¶ 8.) Insofar as Pillsbury and Haagen-Dazs sought to imply that Mr. Jesse obtained confidential information related to the issues in this case, Mr. Jesse flatly denied that he received any such information. In his declaration, he refuted point by point the declarations submitted by Pillsbury and Haagen-Dazs seeking to impute confidential knowledge to him. (Jesse Declaration ¶ 8-29.)

At the time Gray, Plant learned that Pillsbury and Haagen-Dazs intended to raise ethical claims concerning Double Rainbow's counsel, Gray, Plant instituted formal screening procedures to isolate Mr. Jesse from this litigation. These procedures were embodied in a memorandum of November 6, 1985, setting forth the following guidelines and restrictions:

> 1. No attorney in the office is to have access to any file or other documentary material relating to this litigation without prior clearance from D. R. Shulman. Anyone receiving any file or other documentary material relating to this litigation is not to communicate said material or its contents to any other person without prior clearance from D. R. Shulman.
>
> 2. There is to be no discussion of this litigation with Frank Jesse or in his presence.

3. All attorneys are required to communicate the foregoing rules to support staff, and to take all appropriate steps to make sure that the foregoing rules are given full force and effect.

Notwithstanding Mr. Jesse's declarations (which the district court said would be accepted as true), and Gray, Plant's screening procedures, the district court on May 21, 1986 disqualified Mr. Jesse and Gray, Plant from further representation of any party to this litigation. To do so, the district court found that Mr. Jesse's work at Pillsbury bore a substantial relationship to the issues of this case, although Double Rainbow's evidence was directly to the contrary. On September 24, 1986, the Ninth Circuit Court of Appeals denied Double Rainbow's petition for a writ of mandamus, seeking reversal of the district court's order, or, alternatively, an evidentiary hearing in the district court.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO SET FORTH STANDARDS FOR DISQUALIFICATION OF COUNSEL IN CASES ARISING UNDER FEDERAL LAW.

This Court has held that an order granting a motion to disqualify counsel is not immediately appealable. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 86 L. Ed. 2d 340, 105 S. Ct. 2757 (1985). If a district court grants a motion to disqualify, the only remedies available are a motion to certify the question for interlocutory appellate review under 28 U.S.C. § 1292 (b), or "in the *exceptional circumstances* for which it was designed, a writ of mandamus from the court of appeals *might* be available." 86 L. Ed. 2d at 349 (emphasis added). The former procedure, however, is doubtful, because an immediate appeal is unlikely "materially [to] advance the ultimate termination of the litigation," and may in fact prolong it. 28 U.S.C. § 1292(b). And the latter is equally difficult, because of the stringent standards applicable to granting the writ of mandamus. *See Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34-35, 66 L. Ed. 2d 193, 101 S. Ct. 188 (1980) ("remedy of mandamus is a drastic one," "only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy"). Thus, litigants in the position of Double Rainbow are essentially without an adequate appellate remedy to challenge disqualification of counsel by district courts.

This case represents an opportunity for this Court to build upon the *Richardson-Merrell* decision by providing the lower courts with a statement of the standards to be applied where disqualification is sought in cases brought under federal law.

Specifically, this Court should set forth standards regarding: (1) the right to an evidentiary hearing when a factual dispute exists regarding an allegedly "tainted" attorney's access to and possession of confidential information; and (2) the effect of screening procedures, or a "Chinese Wall," utilized to separate an allegedly "tainted" attorney from the remainder of the firm.

In *Richardson-Merrell*, this Court effectively blocked appellate review of disqualification orders. In so doing, however, this Court, no doubt unintentionally, invited parties to make increased use of motions to disqualify opposing counsel. Such motions have long been subject to abuse and misuse as a tactical ploy, intended more to disable an adversary than to protect any legitimate interest of the movant. *See Bottaro v. Hatton Associates*, 680 F.2d 895, 896 (2d Cir. 1982) (standards invite wholesale filing of motions to disqualify counsel for tactical reasons); *Armstrong v. McAlpin*, 625 F.2d 433, 444 (2d Cir. 1980), *vacated*, 449 U.S. 1106, 66 L. Ed. 2d 835, 101 S. Ct. 911 (1981) ("disqualification motions are often interposed for tactical reasons"). Indeed, such was the motion in this case, where the allegedly tainted counsel had no access to confidential information in his former employment. Unless this Court provides procedural and substantive guidelines to lower courts, such motions can be expected to proliferate, for movants have nothing to lose and no concern for scrutiny by reviewing courts. In the interest of justice and the fair and efficient administration of the federal courts, this Court should grant certiorari to establish procedural and substantive safeguards so that litigants may enjoy their right to counsel of their choice unimpaired by tactically-motivated and baseless disqualification motions.

II. THE LOWER COURTS ERRED BY RULING THAT PETITIONER WAS NOT ENTITLED TO AN EVIDENTIARY HEARING, AND BY DISQUALIFYING PETITIONER'S COUNSEL IN THE ABSENCE OF A HEARING.

The substantive standard generally applied for disqualification, and applied in this case, is whether the former representation is "substantially related" to the current litigation in the sense that the "factual contexts of the two representations are similar or related." *Trone v. Smith*, 621 F.2d 994 (9th Cir. 1980); *accord, Evans v. Artek Sys. Corp.*, 715 F.2d 788 (2d Cir. 1983); *Cossette v. Country Style Donuts, Inc.*, 647 F.2d 526 (5th Cir. 1981); *LaSalle Nat. Bank v. County of Lake*, 703 F.2d 252 (7th Cir. 1983); *State of Ark. v. Dean Foods Prod. Co., Inc.*, 605 F.2d 380 (8th Cir. 1979). If the allegedly tainted lawyer did not personally work on substantially related matters, but his former firm (here the Pillsbury law department) may have done so, the former lawyer and his new firm may then present evidence rebutting any presumption that he personally acquired confidential information, and thereby avoid disqualification. In *Trone v. Smith* the Ninth Circuit recognized that:

> [t]he possible harshness of this rule is mitigated by the "peripheral representation" standard developed by the Second Circuit, under which an attorney previously associated with a firm that handled matters substantially related to those in which the attorney's disqualification is sought, may show that he or she had no personal involvement in such substantially related matters and did not actually receive any confidential information relevant to the matter in which disqualification is sought.

621 F.2d 994, 998 n.3 (9th Cir. 1980); *accord, Schiessle v. Stephens*, 717 F.2d 417, 421 (7th Cir. 1983); *Smith v. Whatcott*, 757 F.2d 1098, 1101, n.2 (10th Cir. 1985).

With these rules, Double Rainbow has no quarrel. The significant point, however, is that these standards involve highly factual matters, and require a factually-intensive inquiry by the court to which the motion is made. Furthermore, disqualification of a litigant's chosen counsel can have devastating effects on a litigant's ability to prosecute the case on the merits, or to obtain a "just, speedy, and inexpensive determination" of the action, as vouchsafed and intended by the Federal Rules of Civil Procedure. F.R.C.P.1. Accordingly, where disqualification is sought on the basis of substantially-disputed assertions of fact, as here, justice and fundamental fairness require that the party against whom the motion is made have every opportunity to present controverting proof and challenge the movant's proof through cross-examination. *See Fullmer v. Harper*, 517 F.2d 20, 21 (10th Cir. 1975); *Melamed v. ITT Continental Baking Co.*, 534 F.2d 82 (6th Cir. 1976). Such safeguards, unfortunately, were wholly lacking here.

In this case, Judge Legge found that "while at Pillsbury Mr. Jesse worked on matters substantially related to this litigation, and that there is a reasonable basis for concluding that he received confidential information relevant to this litigation." 639 F. Supp. at 286. In so holding, however, Judge Legge relied not on competent first-hand evidence that Mr. Jesse was privy to confidential communications or actually involved in substantially related matters, but rather, on the inference arising merely from Mr. Jesse's being a lawyer in the Pillsbury law department. Judge Legge reasoned:

> While Mr. Jesse and the Gray firm have attempted to show that his distribution-related work was limited to international matters, it appears that Mr. Jesse had in-

> formation concerning Haagen-Dazs' domestic distribution strategies as well. Mr. Jesse worked for a lengthy period of time in the Pillsbury law department, and *it is reasonable to conclude that*, as a senior attorney in that office, he also had significant contact with Pillsbury management during the formulation of its super premium ice cream acquisition and marketing strategy. While Mr. Jesse states that he was not aware of Haagen-Dazs' distribution policies, *his presence in the legal department* at the time Pillsbury entered this super premium ice cream market *suggests that he was at least exposed to* management's and the legal department's consideration of distribution policies. In addition, his employment during the Ben & Jerry's litigation *raises an inference* that he was privy to information about that litigation which is, in itself, substantially related to this litigation.

639 F. Supp. at 286 (emphasis added).

After so finding a substantial relationship between the present litigation and the matters handled by the Pillsbury law department during Mr. Jesse's employment, the district court, in a summary fashion, found that Double Rainbow had not rebutted the presumption that Mr. Jesse was personally involved in these substantially related matters: "The record demonstrates that Mr. Jesse did have personal involvement in legal matters which the Court finds are substantially related to the issues in this case, and that he did receive certain relevant confidential information." 639 F. Supp. at 287.

The problem with the court's analysis, however, is that the declarations of Messrs. Jesse and Shulman *directly contradicted* and *denied* the trial court's findings of fact. Thus, the trial court could not have made the findings giving rise to disqualification without choosing between conflicting evidence,

rejecting and ignoring Double Rainbow's evidence, accepting disputed factual assertions of Pillsbury and Haagen-Dazs, and drawing inferences adverse to Double Rainbow. But such methods of fact-finding are ordinarily appropriate only where witnesses have testified live, subject to cross-examination and in person evaluation of credibility.

Such procedural safeguards ought to be especially applicable to proceedings on a motion to disqualify, where a litigant faces loss of a substantial right, choice of counsel, without the protection of appellate review, through a motion that is an invitation to abuse of judicial processes, and has been repeatedly so used in the past. At least, a party risking loss of counsel ought to be able to cross-examine witnesses he knows to be giving false or insupportable testimony. In short, there ought to be an evidentiary hearing where there is a clear conflict in the evidence, as here, and a hearing is timely requested.

Here, there was no hearing, although Double Rainbow seven times requested one. Rather, the court denied a hearing after promising to take Double Rainbow's evidence as fact. Then, in deciding the motion, the court did the opposite. Clearly, if the court intended to act as fact-finder, Double Rainbow should have had the hearing it requested and was denied.

Double Rainbow requested an evidentiary hearing on numerous occasions, both before and during the hearing. At the hearing, however, Judge Legge refused to allow Double Rainbow to put Mr. Jesse on the stand or to cross examine the movants' witnesses who were present at the hearing. Indeed, Judge Legge did not even address Double Rainbow's asserted right to an evidentiary hearing in his Opinion and Order.

Given the highly factual nature of the issues raised, there is substantial authority that Double Rainbow is entitled to an evidentiary hearing. In *Fullmer v. Harper*, 517 F.2d 20, 21 (10th Cir. 1975) the Tenth Circuit stated:

> In our view the verified motion to disqualify raises equitable questions that are conceivably of a serious nature. In such circumstances, a written response should be required. The trial court should then hold a full evidentiary hearing on the issues posed by the motion to disqualify and the response thereto, which hearing should include the taking of testimony.

Accord Melamed v. ITT Continental Banking Co., 534 F.2d 82, 84 (6th Cir. 1976); *Jones v. City of Chicago*, 610 F. Supp. 350, 354 (N.D. Ill. 1984).

In this case the district court's failure to allow an evidentiary hearing is a gross error. Given the stark differences between the factual accounts presented by the parties, the district court necessarily decided disputed issues of fact. The Sixth Circuit has stated in *General Mill Supply Co. v. SCA Services, Inc.*, 697 F.2d 704, 710 (6th Cir. 1982) that a decision for disqualification is adequately founded without an evidentiary hearing only ". . . if the district judge does not undertake to decide disputed issues of fact."

As noted in *Silver Chrysler Plymouth v. Chrysler Motors Corp.*, 518 F.2d 751, 753 (6th Cir. 1975), a motion to disqualify counsel requires a "thorough consideration of the facts," a "painstaking analysis of the facts." It was essential that the district court have a chance to observe the demeanor and credibility of the witnesses. In addition, the declarations presented by Pillsbury and Haagen-Dazs were without foundation and not based on personal knowledge, but rather, on innuendo, inference, and speculation. Given the nature of this evidence, it was essential that Double Rainbow be given the opportunity to cross examine these witnesses. There was also a need for an evidentiary hearing to establish the foundation or lack of foundation of various documents that were pre-

sented by Pillsbury and Haagen-Dazs at the hearing. (*E.g.*, Reporter's transcript at p. 38.)

Several times during the hearing Double Rainbow's counsel noted the need for the presentation of testimony and cross examination. The district court, however, felt that it could weigh the evidence simply by looking at the declarations. For example, at one point Double Rainbow's counsel stated that Double Rainbow had requested an evidentiary hearing because many of the statements made in the declarations submitted by Pillsbury and Haagen-Dazs were based on implication rather than personal knowledge. (Reporter's transcript at p. 26; *see* pp. 81 and 85 for additional requests by Double Rainbow counsel for the opportunity to cross-examine.) In response, Judge Legge stated: "Well do you really think they are going to say something that they haven't said in their declarations?" (Reporter's transcript at p. 27.) Counsel replied: "They are going to have to say some of the major statements they had made in their declarations they have no personal knowledge of, therefore [they] cannot state those as facts that this Court can consider." (Reporter's transcript at p. 27.) Judge Legge, however, felt that he could determine whether the declarations submitted by Pillsbury and Haagen-Dazs were based on personal knowledge by weighing them against Mr. Jesse's rebuttal declaration. (Reporter's transcript at pp. 27 and 28.)

Judge Legge simply failed to recognize the well-recognized utility of cross-examination where credibility is an issue. An evidentiary hearing is essential in a situation where, as here, the credibility of the witnesses and the foundation or lack of foundation of the statements made by the witnesses are crucial to the proper resolution of the disqualification motion. Given the circumstances, the district court's refusal to allow an evidentiary hearing cannot be justified. And this Court ought to grant certiorari in order to provide guidelines to lower courts that will protect the rights of litigants facing disqualification motions premised on directly disputed assertions of fact.

III. THE LOWER COURTS ERRED BY CONCLUDING THAT THE SCREENING PROCEDURES INSTITUTED BY PETITIONER'S COUNSEL WERE INEFFECTIVE SIMPLY BECAUSE THEY WERE IMPLEMENTED IMMEDIATELY AFTER THE MOTION TO DISQUALIFY WAS MADE.

This Court has never addressed the validity of screening procedures implemented to insulate a law firm from disqualification when one of its attorneys allegedly possesses confidential information of an adverse party. Screening procedures and safeguards such as those instituted by Gray, Plant have generally been found acceptable. *See Armstrong v. McAlpin*, 625 F.2d 433, 442 (2d Cir. 1980); *Kesselhaut v. United States*, 555 F.2d 791, 793 (Ct. Cl. 1977); *LaSalle National Bank v. County of Lake*, 703 F.2d 252, 255-56 (7th 1983). In *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1267 (7th Cir. 1983), the court recognized that:

> [t]here is an exception for the case where a member or associate of a law firm (or government legal department) changes jobs, and later he or his new firm is retained by an adversary of a client of his former firm. In such a case, even if there is a substantial relationship between the two matters, the lawyer can avoid disqualification by showing that effective measures were taken to prevent confidences from being received by whichever lawyers in the new firm are handling the new matter.

Here Gray, Plant implemented such "effective measures" to prevent any alleged confidences from being received by any other Gray, Plant attorneys from Mr. Jesse. Gray, Plant thereby rebutted any presumption that Mr. Jesse shared any confidential information with those attorneys working on this

litigation. Disqualification of the entire Gray, Plant firm was therefore unwarranted.

In *Smith v. Whatcott*, 757 F.2d 1098, 1101 (7th Cir. 1985) the court set forth guidelines to determine if screening procedures sufficiently prevent any flow of purported confidential information:

> Factors to be considered "include, but are not limited to, the size and structural divisions of the law firm involved, the likelihood of contact between the 'infected' attorney and the specific attorneys responsible for the present representation, the existence of rules which prevent the 'infected' attorney from access to relevant files or other information pertaining to the present litigation or which prevent him from sharing in the fees derived from such litigation."

Here, the Gray, Plant firm consists of roughly 60 lawyers, is departmentalized, and, as structured, presented little likelihood of Mr. Jesse's coming in contact with the attorneys handling this litigation. Furthermore, Mr. Jesse has no financial interest in this litigation, and specific screening procedures have been in place to prevent contact between him and the attorneys handling this litigation. (Clearly, at present, Mr. Jesse has no financial interest in this litigation. The only way in which he could ever acquire a financial interest would be if such an interest were conferred upon him at the time of his consideration for shareholder status in the Gray, Plant firm. As indicated in correspondence from Double Rainbow's counsel to counsel for movants, the issue of Mr. Jesse's obtaining a financial interest in this litigation will be considered at such time as Mr. Jesse is ever considered for shareholder status. Obviously, if ethical considerations militate against Mr. Jesse's receiving a financial interest in this litigation, he will not receive any such interest.)

Mr. Jesse has worked primarily on matters of international law for the Gray, Plant firm; he appears on the Gray, Plant letterhead as "International Counsel." He has not been engaged in litigation or assigned to the Litigation Department. To disqualify the entire Gray, Plant firm under these circumstances was unwarranted, unfair, and contrary to law.

Significantly, under Minnesota law, which closely tracks federal law in this area, disqualification would not be permitted, in view of Mr. Jesse's relationship with the Gray, Plant firm and the internal screening procedures in place. *Jenson v. Touche Ross & Co.*, 335 N.W.2d 720, 732 (Minn. 1983):

> . . . [I]t is also then presumed that Mr. Levy [the tainted attorney] conveyed these confidences to his present Oppenheimer affiliates [the new firm]; this presumption, however, may be rebutted. Here we conclude that the trial court found, on an adequate factual basis, that the presumption was rebutted.
>
> This brings us to the third step, namely, weighing the competing equities. We agree with the trial court's balancing of the equities. Plaintiffs are asking for disqualification of a firm of over 80 lawyers. Mr. Levy's connection with his new firm is only 'of counsel.' . . . In this instance, for the Oppenheimer firm to continue to represent its client with a 'Chinese Wall' separating Mr. Levy does not offend the appearance of professional proprieties under Canon 9.
>
> * * *
>
> "[A]n inexorable disqualification of an entire firm for the disqualification of a single member or associate, is entirely too harsh, and should be mitigated by appropriate screening such as we now have here." *Kesselhaut v.*

> *United States*, 555 F.2d 791, 793 (Ct. Cl. 1977). "A court should be conscious of its responsibility to preserve a reasonable balance between the need to ensure ethical conduct on the part of lawyers appearing before it and other social interests, which include the litigant's right to freely chosen counsel." *Woods v. Covington County Bank*, 537 F.2d 804, 810 (5th Cir. 1976).

Similarly, Double Rainbow successfully rebutted whatever presumption may have existed that Mr. Jesse communicated to other lawyers at Gray, Plant any confidential information substantially related to this litigation.

The district court, however, erroneously concluded that simply because screening procedures were not implemented until after the motion to disqualify was made, such procedures would not insulate the firm from disqualification. This reasoning, applied by the Seventh Circuit in *La Salle Nat. Bank v. County of Lake*, 703 F.2d 252 (7th Cir. 1983), places Gray, Plant in an impossible situation. If Gray, Plant does not know that there is any basis to assume one of its attorneys possesses confidential information, obviously it cannot implement screening procedures. Yet, if it does not implement screening procedures immediately upon hiring the "tainted" attorney or upon accepting the case later alleged to present an ethical problem, the standard applied by the district court would serve to disqualify the entire firm. Such an approach is unwarranted and unworkable for large law firms.

Rather, screening procedures should be examined in combination with other evidence to determine if a law firm received confidential information. Other evidence in the record, accepted as true, reveals that Gray, Plant has not received any confidential information substantially related to this case. The lower courts, therefore, erred by disqualifying the entire Gray, Plant firm.

Accordingly, as a further safeguard against the abuse of disqualification motions, this Court ought to grant certiorari to establish guidelines that law firms may follow in implementing screening procedures that will permit clients safely to exercise their right to be represented by counsel of their choice.

IV. CONCLUSION

On the basis of the foregoing arguments and authorities, Double Rainbow respectfully petitions this Court for a writ of certiorari to review the question presented herein. As indicated, this litigation arises under the federal antitrust laws, for which this Court has long shown special solicitude. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969). Because of this Court's prior ruling in *Richardson-Merrell* that orders disqualifying counsel are not immediately appealable, this Court opened the door for baseless disqualification motions to be used as a tactic not only in antitrust cases, but in all cases brought in federal courts. Such a motion was made and granted in this case. The respondents falsely claimed that an associate of a law firm representing petitioner had access to confidential information while employed by respondents. By competent evidence, petitioner directly denied these false allegations. Nonetheless, without an opportunity for an evidentiary hearing, live testimony, and cross-examination, the district court resolved conflicting facts against petitioner, refused to consider the effectiveness of screening procedures put in place by petitioner's counsel, and granted the motion for disqualification. This petition presents this Court with an opportunity to establish procedural and substantive guidelines to preclude such abuses, which are the unintended but inevitable consequences of the *Richardson-Merrell* decision.

To preserve the important right of litigants to counsel of their choice in actions brought in federal courts, this Court should grant the writ.

Respectfully submitted this 24th day of December, 1986.

GRAY, PLANT, MOOTY,
MOOTY & BENNETT
ALIOTO & ALIOTO
Counsel for Petitioner
DANIEL R. SHULMAN
JOSEPH M. ALIOTO

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APPENDIX

EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-7321
DC Nos. C-85-5819, C-85-6553, C-86-0853
Northern California

DOUBLE RAINBOW GOURMET ICE CREAMS, INC.,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

and

PILLSBURY COMPANY, INC., et al.,
Real Parties in Interest.

ORDER

Before: WALLACE and SCHROEDER, Circuit Judges.

The petition for a writ of mandamus is denied. The district court's order granting the motion to disqualify is not clearly erroneous. *See Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977). Nor is its decision not to hold an evidentiary hearing clearly erroneous. *See General Mill Supply Co. v. SCA Services, Inc.*, 697 F.2d 704 (6th Cir. 1982).

EXHIBIT B

The HAAGEN-DAZS COMPANY, INC., et al.,
Plaintiffs,

v.

PERCHE NO! GELATO, INC.,
Defendant.

The HAAGEN-DAZS COMPANY, INC., et al.,
Plaintiffs,

v.

DOUBLE RAINBOW GOURMET ICE CREAMS, INC., et al.,
Defendants.

DOUBLE RAINBOW GOURMET ICE CREAMS, INC.,
Plaintiff,

v.

The PILLSBURY COMPANY, et al.,
Defendants.

And related counterclaims.

Nos. C-85-5819-CAL, C-85-6553-CAL and C-86-0853-CAL.

United States District Court, N.D. California.

May 21, 1986.

Plaintiff sought disqualification of defendant's counsel in antitrust litigation. The District Court, Legge, J., held that plaintiffs were entitled to disqualification of Minneapolis, but not San Francisco, counsel.

Motion granted in part and denied in part.

1. Attorney and Client —20

A district court faced with a motion to disqualify counsel need not determine that actual confidences were disclosed to

counsel; rather, it is possibility of breach of confidence, not fact of breach, that triggers disqualification.

2. Attorney and Client —21

Test for disqualification of counsel due to his prior representation of opposing party provides that counsel may attempt to rebut presumption of substantial relation between prior representation and present representation by showing that he had no personal involvement in substantially related matters and did not actually receive any confidential information relevant to matter in which disqualification is sought.

3. Attorney and Client —21.20

Evidence disclosed substantial similarities in legal employment of counsel, who formerly worked in plaintiff's legal department and who currently worked with law firm representing defendant in antitrust litigation; therefore, counsel and his law firm would be disqualified.

4. Attorney and Client —21

Substantial relationship standard for determining disqualification of counsel does not require moving parties to point to specific piece of confidential information which counsel actually received due to prior representation of opposing party.

5. Attorney and Client —21.5(2)

Law firm for defendant did not institute screening procedure whereby all files and information relating to antitrust litigation were sealed off from counsel who formerly worked in plaintiff's legal department until after litigation commenced and one year after counsel's present employment; therefore, entire law firm had to be disqualified from representing defendant in antitrust litigation.

6. Attorney and Client —21.5(2)

While defendant's law firm, which was disqualified due to counsel's prior employment with plaintiff as in-house counsel,

and another law firm worked together on antitrust litigation and other litigation, association between two firms did not warrant disqualification of second firm in antitrust litigation.

Pillsbury, Madison & Sutro, William C. Miller, Roland W. Selman, Patrick C. Marshall, San Francisco, Cal., for Pillsbury and Haagen-Dazs.

Joseph M. Alioto, Alioto & Alioto, San Francisco, Cal., Daniel R. Shulman, Gray, Plant, Mooty, Mooty & Bennett, Minneapolis, Minn., John H. Boone, San Francisco, Cal., for Double Rainbow.

Stuart H. Savett, David H. Weinstein, Robert J. La Rocca, Kohn, Savett, Marion & Graf, P.C., Philadelphia, Pa., Josef D. Cooper, Douglas A. Marshall, San Francisco, Cal., for Perche No! Gelato.

Michael C. Kelley, Kadison, Pfaelzer, Woodard, Quinn & Rossi, Los Angeles, Cal., for other parties.

OPINION AND ORDER RE DISQUALIFICATION OF COUNSEL

LEGGE, District Judge.

I.

This is a motion by the Pillsbury Company, Inc., ("Pillsbury"), the parent company of Haagen-Dazs Company, Inc. ("Haagen-Dazs"), for the disqualification of counsel for Double Rainbow Gourmet Ice Cream, Inc. ("Double Rainbow") in this antitrust litigation.

Double Rainbow is a California corporation engaged in the manufacture and sale of super premium ice cream. Pillsbury, a Delaware corporation with its principal place of business in Minneapolis, Minnesota, entered the super premium ice cream market when it purchased Haagen-Dazs in 1983. Haagen-Dazs is a New Jersey corporation which manufactures and sells super premium ice cream. Haagen-Dazs and Double Rainbow

are competitors. The main issue presently raised by this litigation is whether Haagen-Dazs' distribution policies violate the antitrust laws.[1]

Pillsbury and Haagen-Dazs filed this motion to disqualify both San Francisco and Minneapolis counsel from representing Double Rainbow in this series of actions, as well as "any other party . . . [in] substantially related litigation."[2]

II.

The basis for this motion is the past and present employment of Mr. Franklin C. Jesse, Esq., an attorney formerly employed as in-house counsel in the Pillsbury Company legal department, and currently associated with Double Rainbow's Minneapolis counsel, Gray, Plant, Mooty, Mooty & Bennett ("the Gray firm"). Haagen-Dazs and Pillsbury contend that Mr. Jesse's former employment with Pillsbury and current employment with the Gray firm require disqualification of Mr. Jesse. They assert that, as a Pillsbury attorney for ten years, Mr. Jesse was aware of Haagen-Dazs' distribution pol-

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[1] Currently, there are four cases pending in the San Francisco Bay Area involving the legality of Haagen-Dazs' distribution policies. The cases are *The Haagen-Dazs Company, Inc. v. Double Rainbow Gourmet Ice Cream, Inc.*, (N.D.Cal. No. C-85-6553 CAL); *The Haagen-Dazs Company, Inc. v. Perche No! Gelato Inc.*, (N.D.Cal. No. C-85-5819 CAL); *Two Count Company, Inc. v. The Haagen-Dazs Company, Inc.*, (Alameda County Superior Court No. H-107998-8); *Double Rainbow Gourmet Ice Creams, Inc. v. The Pillsbury Company*, (N.D.Cal. No. C-86-0583 CAL) (transferred from the Minnesota District Court on February 18, 1986). Another case, *Perche No! Gelato, Inc. v. The Haagen-Dazs Company, Inc.*, D.N.J. No. 85-4061, (Stern. J.), was ordered transferred to this court by the Judicial Panel on Multidistrict Litigation under 28 U.S.C. § 1407.

[2] The court has determined that the motion to disqualify counsel for Double Rainbow in the Alameda Superior Court action is not properly before this court. The ruling on this motion applies only to the actions pending in this court.

icies, and had access to confidential information relating to the issues underlying this litigation. They also seek an order disqualifying the Gray firm. In addition, they claim that, due to the longstanding affiliation of the Gray firm with Double Rainbow's San Francisco counsel, Alioto & Alioto ("Alioto"), that firm must also be disqualified from participation in this litigation.

The record discloses that Mr. Jesse went to work in the Pillsbury legal department in 1974 and remained until October 1984. During that period, Mr. Jesse held various positions, including general attorney, senior attorney, international group counsel, and senior corporate counsel. From 1980 until October 1984, Mr. Jesse was also a member of the legal department's administration committee.

It appears that Mr. Jesse worked primarily on international business and legal matters while employed by Pillsbury. After Pillsbury acquired Haagen-Dazs in 1983, Mr. Jesse worked on a joint venture with a Japanese dairy through which Haagen-Dazs sought to introduce its super premium ice cream into the Japanese market. Other legal projects for Haagen-Dazs which were handled by Mr. Jesse included an Australian trademark registration and a sales arrangement in Singapore. Haagen-Dazs contends that the international matters handled by Mr. Jesse, particularly the Japanese venture, required a working knowledge of Haagen-Dazs' franchise and distribution policies, including the domestic policies at issue here. Moreover, Haagen-Dazs alleges that Mr. Jesse has knowledge of Pillsbury's acquisition and marketing strategy, since he was a member of the legal department at the time the policy for entering the super premium ice cream market was adopted. Finally, Mr. Jesse was in the legal department in 1984 at the time that office defended a claim brought by Ben & Jerry's

Homemade, Inc., another manufacturer of super premium ice cream, which involved issues identical or similar to those raised in this series of cases.

At the present time, Mr. Jesse is an associate "international counsel" with the Gray firm. Since joining that firm on November 1, 1984, his practice has involved primarily international business matters. Mr. Jesse has stated in a declaration and in a deposition that he has no present knowledge of the distribution policies which are challenged here, and that he was not privy to confidences concerning the issues raised by this litigation. Furthermore, Mr. Jesse states that he has not worked on these cases, or on any of the related cases, and that his only connection with this litigation has been in response to this motion made by Pillsbury and Haagen-Dazs.

III.

Northern District of California Local Rule 110-3 provides that lawyers shall "comply with the standards of professional conduct required of members of the State Bar of California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and decisions of any court applicable thereto."

Rule 1.9(a) of the American Bar Association Model Rules of Professional Conduct (1983)[3] provides that:

> A lawyer who has formerly represented a client in a matter shall not thereafter:

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[3] While the ABA Model Code of Professional Responsibility ("Model Code") has not been incorporated specifically into the Local Rules of this court, California courts have looked to the Model Code to explicate and supplement the rules of professional responsibility governing lawyer conduct in this state. *See Paul E. Iacono Structural Engineer, Inc. v. Humphrey*, 722 F.2d 435, 439 (9th Cir.), *cert. denied* 464 U.S. 851, 104 S.Ct. 162, 78 L.Ed.2d 148 (1983), citing *Chambers v. Superior Court*, 121 Cal.App.3d 893, 898-903, 175 Cal. Rptr. 575, 578-81 (1981).

> (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

The Ninth Circuit has specifically adopted this "substantial relationship" test, and in *Trone v. Smith*, 621 F.2d 994 (9th Cir. 1980), the court elaborated on the standard by stating that the test is met if the factual contexts of the two representations are similar or related, regardless of "whether confidences were in fact imparted to the lawyer by the client" in the prior representation. *Id.* at 998-99.

The Ninth Circuit has noted that the standards for disqualification embody the principles of Canon 4 of the ABA Model Code of Professional Responsibility, which protects the confidences of a client against disclosure and possible use against the client, and Canon 9, which provides that an attorney must avoid even the appearance of impropriety. *Paul E. Iacono Structural Engineer, Inc. v. Humphrey*, 722 F.2d 435, 439 (9th Cir.), *cert. denied* 464 U.S. 851, 104 S.Ct. 162, 78 L.Ed.2d 148 (1983) (discussing Canon 9). *See also Trone*, 621 F.2d at 999 (discussing Canons 4 and 9). The underlying premise is that "both the fact and appearance of total professional commitment are endangered by adverse representation in related cases." *Trone*, 621 F.2d at 999.

[1] A court faced with a disqualification motion need not determine that actual confidences were disclosed to the lawyer.[4] Rather, as the *Trone* court stated, "it is the possibility of the breach of confidence, not the fact of the breach, that

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[4] To the contrary, the courts have held that such a requirement would, in many instances, involve revelation of the confidences the rule was designed to protect. *Trone*, 621 F.2d at 999.

triggers disqualification." *Id.* Elaborating further on the showing required for disqualification, the *Trone* court stated:

> If there is a *reasonable probability* that confidences were disclosed which could be used against the client in a later, adverse representation, a substantial relation between the two cases is presumed.

Id. at 998 (emphasis added).

[2] Acknowledging the "potential harshness" of this standard, the Ninth Circuit test for disqualification provides that the lawyer may attempt to rebut the presumption by showing that he "had no personal involvement in such substantially related matters and did not actually receive any confidential information relevant to the matter in which disqualification is sought." *Id.* at 998 n. 3, citing *Gas-A-Tron v. Union Oil*, 534 F.2d 1322, 1324-25 (9th Cir.), *cert. denied*, 429 U.S. 861, 97 S.Ct. 164, 50 L.Ed.2d 139 (1976); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 754 (2d Cir. 1975).

Thus, to make the showing necessary for disqualification of Double Rainbow's counsel, Haagen-Dazs and Pillsbury must establish that Mr. Jesse, while at Pillsbury, worked on matters substantially related to this litigation, or that there is a reasonable probability that Mr. Jesse received confidential information. If there is a showing that Mr. Jesse was privy to client confidences substantially related to this litigation, Double Rainbow may then attempt to show that Mr. Jesse had no personal involvement in the substantially related matters.

Regardless of the particular language used by the courts and the rules of professional conduct to define the standards, a common principle underlies all of them: the interests of the clients are primary, and the interests of the lawyers are secondary.

IV.

[3] The court has reviewed the exhibits and memoranda submitted by both parties and in light of the above standards concludes that, while at Pillsbury, Mr. Jesse worked on matters substantially related to this litigation, and that there is a reasonable basis for concluding that he received confidential information relevant to this litigation.

[4] The substantial relationship standard does not require the moving parties to point to a specific piece of confidential information which the attorney actually received. The record here discloses substantial similarities in the legal employments of Mr. Jesse and the legal and business matters involved in those employments. While Mr. Jesse and the Gray firm have attempted to show that his distribution-related work was limited to international matters, it appears that Mr. Jesse had information concerning Haagen-Dazs' domestic distribution strategies as well. Mr. Jesse worked for a lengthy period of time in the Pillsbury legal department, and it is reasonable to conclude that, as a senior attorney in that office, he also had significant contact with Pillsbury management during the formulation of its super premium ice cream acquisition and marketing strategy. While Mr. Jesse states that he was not aware of Haagen-Dazs' distribution policies, his presence in the legal department at the time Pillsbury entered the super premium ice cream market suggests that he was at least exposed to management's and the legal department's consideration of distribution policies. In addition, his employment during the Ben & Jerry's litigation raises an inference that he was privy to information about that litigation which is, in itself, substantially related to this litigation.

In reaching these conclusions, the court has taken into consideration the unique role that access to business thinking plays in the context of antitrust litigation. In *Chugach Elec-*

tric Association v. United States District Court, 370 F.2d 441 (9th Cir. 1966), *cert. denied*, 389 U.S. 820, 88 S.Ct. 40, 19 L.Ed.2d 71 (1967), the Ninth Circuit noted that possible access to the business strategies of a former client might put the attorney in a position to acquire "knowledge casting light on the purpose of later acts and agreements" which underlie the antitrust action. *Id.* at 443-44. In addition, the attorney's "knowledge of private matters gained in confidence would provide him with greater insight and understanding of the significance of subsequent events in an antitrust context and offer a promising source of discovery." *Id.* Here, the moving parties are understandably concerned that, given the considerable period of time spent by Mr. Jesse in responsible positions in the Pillsbury legal department, he is likely to have insights into productive discovery strategies and the business thinking underlying distribution policies.

The court further finds that the presumptions in favor of Pillsbury's and Haagen-Dazs' position have not been rebutted. The record demonstrates that Mr. Jesse did have personal involvement in legal matters which the court finds are substantially related to the issues in this case, and that he did receive certain relevant confidential information.

The court concludes that disqualification of Mr. Jesse is necessary to protect Haagen-Dazs' and Pillsbury's confidences and to avoid the appearance of impropriety.

V.

The court must then consider whether Mr. Jesse's present employer, the Gray firm, should be disqualified from this litigation.

The Ninth Circuit has ruled that an entire law firm must be disqualified when one of its members was counsel for an adverse party in a substantially related matter. *Trone*, 621 F.2d at 999. Disciplinary Rule 5-105(d) of the Model Code states:

> ". . . if a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, *no partner, or associate, or any other lawyer affiliated with him or his firm,* may accept or continue such employment."

ABA Model Code of Professional Responsibility, DR 5-105(d) (1979) (emphasis added).

Since the court has concluded that Mr. Jesse must be disqualified, it follows under the rule set forth in the *Trone* case and the Model rule that the law firm of Gray, Plant, Mooty, Mooty & Bennett must also be disqualified from further representation in this litigation.

The Gray firm has argued that its disqualification is not mandated because it instituted a screening procedure whereby all files and information relating to this litigation were sealed off from Mr. Jesse. The Ninth Circuit has considered this so-called "Chinese Wall" defense twice, but has left open the question whether such a screening procedure is sufficient to defeat a disqualification motion when a member of the firm has previously worked on matters substantially related to the pending litigation. *See Trone*, 621 F.2d at 999 n. 4; *Paul F. Iacono Structural Engineer, Inc.*, 722 F.2d at 441. Other courts have found such screening procedures to be acceptable under certain circumstances. *See, e.g., Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1267 (7th Cir. 1983); *La Salle National Bank v. County of Lake*, 703 F.2d 252 (7th Cir. 1983); *Armstrong v. McAlpin*, 625 F.2d 433, 442-44 (2d Cir. 1980) *(en banc) vacated on other grounds*, 449 U.S. 1106, 101 S.Ct. 911, 66 L.Ed.2d 835 (1981).[5] At the least, the burden

[5] The *Armstrong* court found that screening procedures were effective in the context of a firm employing a former government attorney. There, the court endorsed the "Chinese Wall" defense at least in part because of its concern that the government should maintain its ability to recruit highly qualified lawyers for public service. Such a policy consideration is not applicable in this case.

is shifted to the law firm to establish the effectiveness of its "Chinese Wall" procedures.

[5] In this case, it appears that the Gray firm did not institute the "Chinese Wall" measures until *after* the first of these suits had been filed. The record discloses that Mr. Jesse joined the Gray firm in November 1984. The Gray firm was first contacted concerning the litigation in August, 1985. The complaint was filed on August 30, 1985. Haagen-Dazs then requested that the Gray firm disqualify itself on or about October 30, 1985. On November 6, 1985, the Gray firm instituted its screening procedures. In light of the fact that the screening procedures were not instituted until after the litigation commenced, and one year after Mr. Jesse's employment, the court concludes that Double Rainbow's "Chinese Wall" defense will not insulate the firm from disqualification.

Further, Pillsbury and Haagen-Dazs have demonstrated that the interests of those clients would be adversely affected by Gray's continued representation. However, Double Rainbow has not demonstrated that it will suffer any material adverse consequences as a result of Gray's disqualification.

VI.

[6] Haagen-Dazs and Pillsbury argue that the Gray firm and the Alioto firm have a long-standing relationship "characterized by continuous exchange of information, strategy and advice," and that the Alioto firm must therefore be disqualified on the basis of its affiliation with the Gray firm.

The record discloses that Double Rainbow and Two Count Inc., the distributor involved in the related state court action, are clients of the Alioto firm. The Gray firm was retained by Alioto to assist in this litigation, and the Gray firm currently works with Alioto on this and approximately ten other cases. The fee arrangement between the firms is that Alioto compensates the Gray firm for fees it generates, and the clients,

Double Rainbow and Two Count, Inc., compensate the Alioto firm.

In evaluating the association of these two firms, the court notes that there is nothing on the record to suggest that Mr. Jesse had any direct contact with the Alioto firm. Rather, Haagen-Dazs seeks to disqualify Alioto by imputing knowledge gained from Mr. Jesse's prior employment, through Gray to the Alioto firm. Additionally, Haagen-Dazs has argued that Mr. Jesse's prior employment has created an appearance of impropriety which may extend to the relationship between the Gray firm and Alioto.

However, on the basis of the record, the court finds that while the two firms have worked together on this and other litigation, the association between Alioto & Alioto and the Gray firm does not warrant disqualification of the Alioto firm. In the court's view, the risk of disclosure of client confidences will be virtually eliminated by the disqualification of the Gray firm. That disqualification should also greatly reduce any appearance of impropriety. The record does not warrant the extension of vicarious disqualification to another level.

In addition, the court will order the Alioto firm to return to the Gray firm all of the documents and information which it has obtained from Gray. The court recognizes that there may be questions regarding the effectiveness of, or the compliance with, this requirement. However, the Alioto firm must undertake good faith compliance, which should result in the purging of most of the "tainted" information, if any. If Haagen-Dazs and Pillsbury question the Alioto firm's compliance, or the effectiveness of this requirement, they can raise the issue by further motion at a later time.

VII.

THEREFORE, IT IS ORDERED that:

(1) Mr. Franklin Jesse is disqualified from further representation of any party to this litigation;

(2) Gray, Plant, Mooty, Mooty & Bennett, are disqualified from further representation of any party to this litigation;

(3) The requested disqualification of Alioto & Alioto is denied;

(4) Alioto & Alioto will return to the Gray firm all of the information and documents which it has obtained from that firm;

(5) The case pending in Alameda Superior Court, No. H-107998-8, is not before this court, and this order is therefore not binding on the state court;

(6) While the court stated its intended rulings at a hearing on April 4, 1986, this order is effective as of this date.

Supreme Court, U.S.
FILED
JAN 31 1987
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No. 86-1036

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

DOUBLE RAINBOW GOURMET ICE CREAMS, INC.,
Petitioner,

VS.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA,
THE PILLSBURY COMPANY, and
THE HÄAGEN-DAZS COMPANY, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the district court abuse its discretion in disqualifying one of petitioner's law firms on the basis of deposition testimony and exhibits, affidavits and oral argument, and in declining to accept additional oral testimony at the hearing when the proposed testimony would not have added anything to the evidentiary record?

2. Did the district court abuse its discretion in ruling that disqualification was not avoided by a "Chinese Wall" which was created well after the disqualified law firm became aware of the conflict and after it had been asked to disqualify itself?

STATEMENT REQUIRED BY SUPREME COURT RULE 28.1

Respondent The Pillsbury Company has the following non-wholly owned subsidiaries and affiliates: Chemicals Marketing and Transportation, Inc.; Midwest Processing Company; Gringoire-Brossard S.A.; Snow Brand Pillsbury Inc.; Sino-American Great Wall Food Industrial Co., Ltd.; Sino-American Great Wall Enterprise Co., Ltd.; Amoy Industries Limited; ETA Foods Limited; and Häagen-Dazs Japan, Inc. It has no parent companies.

Respondent The Häagen-Dazs Company, Inc., is a wholly owned subsidiary of respondent The Pillsbury Company. It has no non-wholly owned subsidiaries or affiliates.

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PRELIMINARY STATEMENT

This case presents no novel issue, no conflict with decisions of this Court, no conflict among the circuits, nor any other matter worthy of this Court's attention. Indeed, the petition presents a purely factual question: whether the district court correctly ruled that an attorney who worked for ten years in the law department of respondent The Pillsbury Company ("Pillsbury") was disqualified to serve as opposing counsel in antitrust litigation against Pillsbury. Documents, deposition testimony and affidavits demonstrated that the attorney had access to and knowledge of matters directly and substantially related to the subject matter of the

underlying lawsuit. Petitioner, through general and equivocal denials, sought but failed to refute that showing. The district court therefore properly disqualified the attorney and the law firm by which he is employed. Oral testimony would have added nothing to the record before the district court, and therefore that court did not abuse its discretion by declining to hear it.

SUMMARY OF THE CASE

Pillsbury's subsidiary, The Häagen-Dazs Company, Inc. ("Häagen-Dazs"), manufactures and sells ice cream on a nationwide basis and competes with petitioner Double Rainbow Gourmet Ice Creams, Inc. ("Double Rainbow"), which manufactures and markets its own brand of ice cream. The central issue in the underlying litigation is whether Häagen-Dazs' distribution policies, particularly its unilaterally adopted and implemented policy of refusing to deal with distributors who handle competing products, violate the antitrust laws.[1]

Respondents Pillsbury and Häagen-Dazs moved to disqualify petitioner's counsel based on the past and present employment of Franklin C. Jesse, an attorney formerly employed as in-house counsel in Pillsbury's Law Department and currently associated with Double Rainbow's Minnesota counsel, Gray, Plant, Mooty, Mooty & Bennett ("Gray, Plant"). Mr. Jesse worked in the Pillsbury Law Department from 1974 until October 1984 and held a variety of high-ranking positions, including Senior Attorney, International Group Counsel, and Senior Corporate Counsel; in addition, he was a member of the Law Department's adminis-

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[1] This litigation, *In Re Super Premium Ice Cream Distribution Antitrust Litigation* (MDL Docket No. 682), consists of four cases involving a number of competing ice cream manufacturers and a former Häagen-Dazs distributor: *The Häagen-Dazs Company, Inc., et al. v. Double Rainbow Gourmet Ice Creams, Inc., et al.* (N.D.Cal. No. C-85-6553 CAL); *The Häagen-Dazs Company, Inc., et al. v. Perché No! Gelato, Inc.* (N.D.Cal. No. C-85-5819 CAL); *Double Rainbow Gourmet Ice Creams, Inc. v. The Pillsbury Company, et al.* (N.D.Cal. No. C-86-0583 CAL); and *Perché No! Gelato, Inc. v. The Haagen-Dazs Company, Inc., et al.* (N.D.Cal. No. C-86-4424 CAL).

tration committee -the body responsible for overseeing all legal affairs of Pillsbury and its subsidiaries (Jesse Aff., p. 7, lines 5-10; Lund Aff., p. 2, lines 20-24; p. 3, line 21 to p. 4, line 8).

After Pillsbury acquired Häagen-Dazs in 1983, Mr. Jesse's principal assignment in the Law Department was to establish a joint venture in Japan, the purpose of which was to duplicate, so far as possible, Häagen-Dazs' operations in the United States, including franchising and distribution (Lund Aff., p. 5, line 7 to p. 7, line 3). The joint venture agreement ultimately negotiated by Mr. Jesse contained an exclusive dealing provision substantially identical to Häagen-Dazs' domestic policy at issue in the underlying litigation (Miller Supp.Aff., Exh. 22; *The Häagen-Dazs Company, Inc. v. Double Rainbow Gourmet Ice Creams, Inc.* (N.D.Cal. No. C-85-6553 CAL), Compl., ¶ 6). The evidentiary record, including deposition testimony, established that Mr. Jesse was required to learn about Häagen-Dazs' domestic policies and operations in order to carry out the joint venture assignment (Lund Aff., p. 6, lines 1-4; Wegener Aff., p. 9, lines 11-14; Lund Dep.Tr., pp. 16, 18, 73-74).

During his tenure, Mr. Jesse also had significant contact with Pillsbury's management during the formation of its strategies for the acquisition of Häagen-Dazs and the marketing of ice cream, and he was exposed to management's and the Law Department's consideration of Häagen-Dazs' distribution policies (Lund Aff., p. 8, line 9 to p. 9, line 16; Wegener Aff., p. 5, line 14 to p. 9, line 5; Lund Dep.Tr., pp. 11-19, 41-43; Wegener Dep.Tr., pp. 62-67). Mr. Jesse was in the Law Department in 1984 at the time the department defended a suit brought by Ben & Jerry's Homemade, Inc., another ice cream manufacturer, which involved issues identical to those raised in the present litigation (Lund Aff., p. 7, line 4 to p. 8, line 8; Wegener Aff., p. 3, line 8 to p. 9, line 5; Lund Dep.Tr., pp. 15-19, 25-26, 41-43, 53-54; Wegener Dep.Tr., pp. 28-32, 45-63, 73-77).

Mr. Jesse joined Gray, Plant in November 1984 as an associate "International Counsel" (Jesse Aff., p. 3, lines 13-24). Alioto & Alioto, Double Rainbow's California counsel, first contacted Gray, Plant concerning this litigation in August 1985 and asked Gray, Plant to join it as co-counsel (Jesse Aff., Exh. 2, item 3p.).

Gray, Plant had never served as counsel for Double Rainbow prior to this action (id., item 4x.). Shortly thereafter, Daniel R. Shulman, one of the Gray, Plant attorneys involved in this litigation, spoke with Mr. Jesse regarding the potential conflict (Jesse Aff., p. 4, line 16 to p. 5, line 2). Double Rainbow's complaint was filed on August 30, 1985. Gray, Plant was formally associated in the litigation in mid-September 1985, and respondents' attorneys asked Gray, Plant to withdraw at the end of October, immediately upon learning of the conflict (Jesse Aff., Exh. 2, item 4v.; Miller Aff., p. 2, line 7 to p. 3, line 24). Gray, Plant declined to do so (Miller Aff., Exh. C), but instead instituted purported "screening procedures," intended to seal off all files and information relating to this litigation from Mr. Jesse, in November 1985—months after the litigation was initiated and well after Gray, Plant was aware of the potential conflict (Jesse Aff., p. 6, lines 11-25, and Exh. 3). The motion for disqualification of both Gray, Plant and its closely associated California co-counsel, Alioto & Alioto, was filed on December 13, 1985.

The evidentiary record presented to the district court on the motion was voluminous and comprehensive. It included the deposition transcripts of Ronald E. Lund, Vice President and Associate General Counsel of Pillsbury, Richard J. Wegener, in-house counsel for Pillsbury, twenty-one deposition exhibits, two declarations by Mr. Jesse, two declarations by William C. Miller, counsel for respondents, and the declarations of Kevin Hurley, President and Chief Executive Officer of Häagen-Dazs, Mr. Shulman, Mr. Lund and Mr. Wegener.[2]

The district court found that:

> "[W]hile at Pillsbury, Mr. Jesse worked on matters substantially related to this litigation, and * * * there is a reasonable basis for concluding that he received confidential information relevant to this litigation.

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[2] The depositions of Lund and Wegener were taken by Double Rainbow's counsel and were made part of the record along with the deposition exhibits. The depositions provided petitioner with every opportunity to "cross-examine the movants' witnesses" (see Pet., p. 15).

> "* * * The record here discloses substantial similarities in the legal employments of Mr. Jesse and the legal and business matters involved in those employments. While Mr. Jesse and the Gray firm have attempted to show that his distribution-related work was limited to international matters, it appears that Mr. Jesse had information concerning Häagen-Dazs' domestic distribution strategies as well" (Pet.Appx., p. A-10).

Having disqualified Mr. Jesse, the district court concluded that his present employer must also be disqualified, rejecting petitioner's contention that its purported "screening procedures" precluded disqualification:

> "In light of the fact that the screening procedures were not instituted until after the litigation commenced, and one year after Mr. Jesse's employment, the court concludes that Double Rainbow's 'Chinese Wall' defense will not insulate the firm from disqualification" (Pet.Appx., p. A-13).

The district court, however, declined to disqualify co-counsel Alioto & Alioto (Pet.Appx., pp. A-13 to A-14).

The Court of Appeals for the Ninth Circuit denied Double Rainbow's petition for a writ of mandamus (Pet.Appx., p. A-1).

ARGUMENT

I. THE DISTRICT COURT PROPERLY APPLIED THE LONG-SETTLED STANDARDS GOVERNING DISQUALIFICATION OF COUNSEL.

Double Rainbow asserts that, because "[i]n *Richardson-Merrell* [*Inc. v. Roller* (1985) 472 U.S. 424], this Court effectively blocked appellate review of disqualification orders," there is a need for this Court to set forth standards for disqualification orders (Pet., p. 11). This is a non sequitur. The standards governing disqualification, particularly the "substantial relationship" test, are well settled and are not a matter of conflict among the various courts (see, e.g., *Trone v. Smith* (9 Cir. 1980) 621 F.2d 994, 998-999; *Smith v. Whatcott* (10 Cir. 1985) 757 F.2d

1098, 1100).[3] Indeed, Double Rainbow concedes that it "has no quarrel" with those rules (Pet., p. 13).

It is obvious that what Double Rainbow is really complaining about is this Court's decision in *Richardson-Merrell* concerning the *availability* of appellate review, not the standards for disqualification. No good reason exists to overturn this Court's decision in *Richardson-Merrell,* and Double Rainbow advances none. Rather, Double Rainbow frankly seeks review of the district court's findings, conceding that "highly factual matters" and "a factually intensive inquiry" are involved (see Pet., pp. 13-15). The Ninth Circuit has already considered that argument, and it concluded that "[t]he district court's order granting the motion to disqualify is not clearly erroneous" (Pet.Appx., p. A-1).

II. THE DECISIONS BELOW CORRECTLY CONCLUDED THAT NO EVIDENTIARY HEARING WAS REQUIRED.

The district court was presented with an extensive and comprehensive evidentiary record on the disqualification motion. Notably, Double Rainbow does not deny that the evidence adduced by respondents showed that Mr. Jesse should be disqualified (see

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[3] In fact, Rule 1.9(a) of the American Bar Association Model Rules of Professional Conduct (1983) specifically incorporates the substantial relationship test into its standards governing disqualification:

> "A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> "(a) represent another person in the same or *a substantially related matter* in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation" (emphasis added).

A substantial relationship exists "if the factual contexts of the two representations are similar or related," and identity of issues presented by the two representations is *not* the test (*Trone v. Smith* (9 Cir. 1980) 621 F.2d 994, 998, 1000). There is no requirement that the former client prove the specific confidential information that may have been or could be disclosed (*Chugach Elec. Ass'n v. United States D.C. for Dist. of Alaska* (9 Cir. 1966) 370 F.2d 441, certiorari denied (1967) 389 U.S. 820).

Pet., pp. 13-15, 16). Rather, Double Rainbow contends that the district court abused its discretion in determining that Mr. Jesse had access to and knowledge of matters directly and substantially related to this lawsuit, despite the district court's statement that it would accept the factual averments of Mr. Jesse's affidavits as true (Pet., p. 15).

The district court, however, was not bound under any circumstances to accept Mr. Jesse's conclusionary assertions that he did not work on any matter bearing a substantial relationship to this litigation. Moreover, Double Rainbow fails to advise this Court (1) that the uncontroverted record (including unchallenged documents) demonstrates that Mr. Jesse was involved in substantially related matters, and (2) that Mr. Jesse's "denials" of *specific* facts were so equivocal, and sometimes contradictory, as to be meaningless.

As Double Rainbow emphasizes, Mr. Jesse did deny generally that he had knowledge of Häagen-Dazs' domestic distribution arrangements (see Jesse Aff., p. 8, lines 18-23).[4] Documentary evidence proved, however, that the Japanese joint venture agreement that Mr. Jesse drafted contained an exclusive dealing provision substantially identical to the policy at issue in the underlying litigation (Miller Supp.Aff., Exh. 22; see *The Häagen-Dazs Company, Inc. v. Double Rainbow Gourmet Ice Creams, Inc.*, supra, Compl., ¶ 6). In addition, documents and deposition testimony demonstrated that Mr. Jesse had access to internal Pillsbury legal documents analyzing the domestic distribution policy; that same evidence also showed that he attended meetings at which the domestic policy was discussed generally as well as specifically in regard to litigation brought by Ben & Jerry's Homemade, Inc., which involved issues identical to those in the underlying litigation (Lund Aff., p. 7, line 4 to p. 9, line 16; Wegener Aff., p. 3, line 8 to p. 9, line 5; Lund Dep.Tr., pp. 11-19, 25-26, 41-43, 53-54; Wegener Dep.Tr., pp. 28-32, 45-63, 73-77).

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[4] That general denial was shortly thereafter qualified by the statement that "to the best of my recollection" Mr. Jesse did not obtain any such knowledge (id., p. 8, line 27 to p. 9, line 4).

If Mr. Jesse's denials were to have any meaning, then obviously they should have addressed and refuted those specific matters. However, Mr. Jesse's denials were equivocal and contradictory. With respect to documents to which he had access, Mr. Jesse asserted simultaneously that (1) he "did not make a practice of reviewing the file," and (2) he did "not recall seeing" any related materials in it (Jesse Aff., p. 20, lines 2-6). Similarly, with respect to other reports, Mr. Jesse asserted both that "I have no recollection of the contents of any of those reports" (id., p. 20, lines 20-23) and that, "[i]n those reports, I saw nothing of any confidential nature" (id., p. 20, lines 14-16).

Although Mr. Jesse denied that he was present at *some* meetings of Pillsbury's legal staff, *he did not deny that he was present at meetings at which matters substantially related to this lawsuit were discussed.* Rather, Mr. Jesse simply suffered from a lack of recall that such events had occurred or that he was present when they did occur.[5] In addition, in one critical respect, Mr. Jesse's denials were pregnant with admission:

> "Mr. Hurley did not explain the domestic business to me *in great detail,* nor did I learn or endeavor to learn about the domestic business *in great detail*" (Jesse Aff., p. 10, lines 2-4) (emphasis added).

Under these circumstances, it is frivolous of Double Rainbow to contend that the district court "ignored" Mr. Jesse's "denials." The "denials" were meaningless. It is likewise frivolous to assert that the district court abused its discretion in declining to hear oral testimony to test credibility. Double Rainbow did not assert

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[5] For example, Mr. Jesse was present at a specific discussion of the Ben & Jerry's antitrust litigation that occurred on September 12, 1984 (Wegener Dep.Tr., pp. 45-62, 73-77; Dep.Exhs. 13, 16). Mr. Jesse did not deny this; instead, he averred that "I have no recollection whatsoever of the presentation" (Jesse Aff., p. 22, lines 11-12). There are a substantial number of similar incidents of lack of recollection (see id., p. 8, line 27 to p. 9, line 4; p. 12, lines 7-8, 22-26; p. 14, lines 8-10, 24-28; p. 18, lines 12-16; p. 19, lines 14-20; Jesse Supp.Aff., p. 2, lines 13-15, 17-21; p. 3, lines 14-16).

either that Mr. Jesse had any additional information to impart or that his recollection had in any way improved.

Thus, the evidence before the district court unequivocally established that Mr. Jesse had in fact been involved in matters substantially related to this litigation. The offered oral testimony would not have added to nor detracted from that conclusion (see, e.g., *Geralnes B.V. v. City of Greenwood Village, Colo.* (D.Colo. 1985) 609 F.Supp. 191, 192 (disqualification motion submitted on affidavits, memoranda, exhibits, deposition testimony and hearing exhibits satisfied hearing requirements)).

The cases cited by Double Rainbow are inapposite. The record was virtually nonexistent in *Fullmer v. Harper* (10 Cir. 1975) 517 F.2d 20, overruled on other grounds, *Firestone Tire & Rubber Co. v. Risjord* (1981) 449 U.S. 368 and in *Melamed v. ITT Continental Baking Co.* (6 Cir. 1976) 534 F.2d 82, overruled on other grounds, *Melamed v. ITT Continental Baking Co.* (6 Cir. 1979) 592 F.2d 290. In *Fullmer,* the *only* "evidence" was a verified motion; the trial court did not even require a written response (517 F.2d at 21). In *Melamed,* the evidentiary record consisted of a solitary affidavit filed by the moving party (534 F.2d at 84).

III. THE DISTRICT COURT PROPERLY RULED THAT THE "CHINESE WALL" DEFENSE WAS NOT AVAILABLE.

Double Rainbow erroneously contends that "[s]creening procedures and safeguards such as those instituted by Gray, Plant have generally been found acceptable" by the courts as a defense to disqualification motions (Pet., p. 18). Even if a "Chinese Wall" defense were available as a general matter—which it is not—Double Rainbow would not be entitled to its benefit under the facts of this case. The purported screening procedure was not effected until well *after* Gray, Plant became aware of the potential conflict and *after* it had been asked to disqualify itself. To be effective, a "Chinese Wall" must be constructed before the potentially disqualifying event occurs, i.e., when the attorney subject to disqualification first joins the firm or when the firm accepts the case (*LaSalle Nat. Bank v. County of Lake* (7 Cir. 1983) 703 F.2d 252, 259). Double Rainbow has failed to cite a

single case to the contrary. Instead, it has cited three cases that support this very point (*Smith v. Whatcott,* supra, 757 F.2d 1098; *Analytica, Inc. v. NPD Research, Inc.* (7 Cir. 1983) 708 F.2d 1263; *LaSalle Nat. Bank v. County of Lake,* supra, 703 F.2d 259).

Moreover, the only two cases cited by Double Rainbow where disqualification was avoided on the basis of a "Chinese Wall" defense involved former *government* attorneys (*Armstrong v. McAlpin* (2 Cir. 1980) 625 F.2d 433 (former SEC lawyer), vacated on other grounds (1981) 449 U.S. 1106; *Kesselhaut v. United States* (Ct.Cl. 1977) 555 F.2d 791 (former FHA, HUD lawyer)). As is indicated by the authority cited by Double Rainbow, courts have found "Chinese Walls" to be effective, if at all, almost exclusively in the context of a firm employing a former government attorney.[6]

Double Rainbow also cites a Minnesota state court case, *Jenson v. Touche Ross & Co.* (Minn.S.Ct. 1983) 335 N.W.2d 720, to support its contention that Gray, Plant's "internal screening procedures" should preclude disqualification (Pet., p. 20). In *Jenson,* however, the court determined that the equities weighed against disqualification because the litigation had been pending for five years and the firm sought to be disqualified had a long-standing prior relationship with its current client. The court, sua sponte, ordered the establishment of a "Chinese Wall" as a form of limited relief for the losing party. In the present case, Gray,

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[6] Courts have drawn a distinction between government and private attorneys—a difference attributable to the importance of attracting qualified attorneys to government service. Potential employers are likely to be reluctant to hire government attorneys who might turn out to be "Typhoid Marys" capable of infecting an entire firm with their disability (see *Kesselhaut v. United States,* supra, 555 F.2d at 793). Screening procedures for former public employees are usually justified in this context because of the role that they play in enabling the government to recruit highly qualified lawyers for public service (Developments in the Law, Conflicts of Interest in the Legal Profession (1981) 94 Harv.L.Rev. 1244, 1364). The American Bar Association has incorporated this distinction into the Model Rules of Professional Conduct (compare Rule 1.10 (Imputed Disqualification: General Rule) with Rule 1.11 (Successive Government and Private Employment)).

Plant had no long-standing relationship with Double Rainbow, the litigation is in its earliest stages, and Double Rainbow continues to be represented by able California counsel.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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